



IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. **75-1432**

LEROY W. ABELL AND JACK R. BARGER, *et al.*,
Petitioners

v.

THE UNITED STATES,
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Leroy W. Abell and Jack R. Barger, et al, petition for a writ of certiorari to review the judgment of the United States Court of Claims in this Case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, p. 1a), is reported at 518 F.2d 1369 (1975).

JURISDICTION

The judgment of the Court of Claims (App. A, *infra*, p. 1a), was entered on June 25, 1975. Petitioners' motion for rehearing was denied on January 9, 1976, (App. B, *infra*, p. 1b).

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

Petitioners, wage board employees of the Bonneville Power Administration of the Department of the Interior (hereinafter "Bonneville") brought suit in the Court of Claims seeking 25 percent Sunday premium back pay for work performed from July 18, 1966, as required by Section 405(f) of the Federal Employees Salary Act of 1966 [5 U.S.C. §5544(a)]. The Court of Claims, in a 2-1 decision, held petitioners were not entitled to recover. The following questions are presented:

1. Whether any federal agency, including Bonneville, can totally disregard the Classification Act of 1949 and a Civil Service Commission final determination specifically authorized by that Act, in the setting of wages for its federal employees?

2. Whether the Classification Act of 1949 superseded Section 10(b) of the Bonneville Project Act of 1937, as amended by Section 5(b) of the Act of October 23, 1945?

3. Whether petitioners are being unlawfully denied 25 percent Sunday premium pay required by Section 405(f) of the Federal Employees Salary Act of 1966, 5 U.S.C. §5544(a)?

STATUTES AND REGULATIONS INVOLVED

Section 23 of the Independent Offices Appropriations Act, 1935, enacted March 28, 1934 (48 Stat. 522), in relevant part provides:

The weekly compensation . . . for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be re-established and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall be compensated for at the rate of not less than time and one half.

* * * * *

Section 10(b) of the Bonneville Project Act of 1937 as amended by section 5(b) of the Act of October 23, 1945 (57 STAT 547), in relevant part provides:

The Administrator, the Secretary of War, and the Federal Power Commission, respectively, are authorized to appoint, subject to the civil service laws, such officers and employees as may be necessary to carry out the purposes of this Act, the appointment of whom is not otherwise provided for, and to fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities (hereinafter 'laborers, mechanics, and workmen') subject to the civil service laws and fix their compensation without respect to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States except the Act of May 29, 1930 (46 STAT 468) as

amended, to the extent that it otherwise is applicable.

* * * * *

Section 405(f) of the Act of July 18, 1966 (80 Stat. 298), in relevant part provides:

The first paragraph of section 23 of the Independent Offices Appropriation Act, 1935, as amended (5 U.S.C. 673c), is amended by inserting immediately before the period at the end thereof the following: "Provided further, That employees subject to this section whose regular work schedule includes an eight-hour period of service any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday shall be paid extra compensation at the rate of 25 per centum of his hourly rate of basic compensation for each hour of work performed during that eight-hour period of service."

* * * * *

The Administrative Procedure Act, Title 5, in relevant part provides:

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) The government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

* * * * *

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

* * * * *

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

* * * * *

The Classification Act, 5 U.S.C. 5101, *et seq.*, in relevant part is given below.

5 U.S.C. § 5101 (formerly Section 101 of the Classification Act of 1949), in relevant part provides:

§ 5101. Purpose

It is the purpose of this chapter to provide a plan for classification of positions whereby—

(1) in determining the rate of basic pay which an employee will receive—

(A) the principle of equal pay for substantially equal work will be followed; and

(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service;

* * * * *

5 U.S.C. § 5102 (formerly Section 202 of the Classification Act of 1949), in relevant part provides:

§ 5102. Definitions; application

(a) For the purpose of this chapter—

(1) "agency" means—

(A) an Executive agency;

(B) the Administrative Office of the United States Courts;

(C) the Library of Congress;

(D) the Botanic Garden;

(E) the Government Printing Office;

(F) the Office of the Architect of the Capitol; and

(G) the government of the District of Columbia; but does not include—

(i) a Government controlled corporation;

(ii) the Tennessee Valley Authority;

(iii) The Alaska Railroad;

(iv) the Virgin Islands Corporation;

(v) the Atomic Energy Commission;

(vi) the Central Intelligence Agency;

(vii) the Panama Canal Company; or

(viii) the National Security Agency, Department of Defense;

(2) "employee" means an individual employed in or under an agency;

(3) "position" means the work, consisting of the duties and responsibilities, assignable to an employee;

(4) "class" or "class of positions" includes all positions which are sufficiently similar, as to—

(A) kind or subject-matter of work;

(B) level of difficulty and responsibility; and

(C) the qualification requirements of the work; to warrant similar treatment in personnel and pay administration; and . . .

(b) Except as provided by subsections (c) and (d) of this section, this chapter applies to all civilian positions and employees in or under an agency. . . .

* * * * *

§ 5102(c)(7) (formerly Section 202(7) of the Classification Act of 1949), in relevant part provides:

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations,

and other employees including foremen and supervisors in positions having trade, craft, or laboring experience and knowledge as the paramount requirement, and employees in the Bureau of Engraving and Printing whose duties are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations;

* * * * *

§5103 (formerly Section 203 of the Classification Act of 1949), in relevant part provides:

§5103. Determination of applicability

The Civil Service Commission shall determine finally the applicability of section 5102 of this title to specific positions and employees, except for positions and employees in the Office of the Architect of the Capitol.

* * * * *

§5341. Policy

It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and be based on principles that—

(1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area;

* * * * *

§5342. Definitions; application

(a) For the purpose of this subchapter—

(1) “agency” means an Executive agency; but does not include—

- (A) a Government controlled corporation;
- (B) the Tennessee Valley Authority;
- (C) the Alaska Railroad;
- (D) the Virgin Islands Corporation;

(E) the Atomic Energy Commission;

(F) the Central Intelligence Agency;

(G) the Panama Canal Company;

(H) the National Security Agency, Department of Defense; or

(I) the Bureau of Engraving and Printing, except for the purposes of section 5349 of this title;

(2) “prevailing rate employee” means—

(A) an individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semi-skilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement;

(B) an employee of a nonappropriated fund instrumentality described by section 2105(c) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement; and

(C) an employee of the Veterans' Canteen Service, Veterans' Administration, excepted from chapter 51 of this title by section 5102(c) (14) of this title who is employed in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or labor experience and knowledge as the paramount requirement; and

(3) “position” means the work, consisting of duties and responsibilities, assignable to a prevailing rate employee.

(b) (1) Except as provided by paragraphs (2) and (3) of this subsection, this subchapter applies to all prevailing rate employees and positions in or under an agency.

(2) This subchapter does not apply to employees and positions described by section 5102(c) of this title other than by—

(A) paragraph (7) of that section to the extent that such paragraph (7) applies to employees and positions other than employees and positions of the Bureau of Engraving and Printing; and

(B) paragraph (14) of that section.

(3) This subchapter, except section 5348, does not apply to officers and members of crews of vessels excepted from chapter 51 of this title by section 5102(c) (8) of this title.

* * * * *

§5343. Prevailing rate determinations; wage schedules; night differentials

(a) The pay of prevailing rate employees shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided by section 206(a) (1) of title 29.

* * * * *

§5541. Definitions

For the purpose of this subchapter—

(2) “employee” means—
but does not include—

(xi) an employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under subchapter IV of chapter 53 of this title, or by a wage board or similar administrative authority serving the same purpose, except as provided by section 5544 of this title;

* * * * *

§5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates

under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. . . . An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service.

* * * * *

Section 1204 of the Classification Act of 1949 states:

All laws or parts of laws inconsistent with this act are hereby repealed to the extent of such inconsistency.

* * * * *

Section 1106 of the Classification Act of 1949 provided:

(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act. Whenever reference is made in any other law to a grade of the Classification Act of 1923, as amended, such reference shall be held and considered to mean the corresponding grade shown in section 604 of this Act.

(b) The application of this Act to any position, officer, or employee shall not be affected by reason of the enactment of subsection (a).

* * * * *

The Indian Claims Commission Act, 25 U.S.C. §70s., in relevant part provides:

§70s. Review by Court of Claims and Supreme Court

... (b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination.

STATEMENT

During all or part of the period from July 18, 1966 to the present time, petitioners were civil service employees serving as substation operators or power dispatchers for the Bonneville Power Administration, Jt. Stip.¹ p. 8, an agency within the Department of Interior charged with the responsibility of marketing electric power generated from Federal hydroelectric projects in the Pacific Northwest. Id. at 4. During all or part of the period of their employment as stated above, each petitioner was in the competitive service of the United States and paid on an hourly basis. Id. at 8. Bonneville's hourly employees are appointed in accordance with the civil service laws of the United States and for purposes of retirement, sick leave, annual leave, severance pay, workmen's compensation, and other benefits are treated substantially the same as annual employees. Id. at 5. The authority of Bonneville to fix

¹"Jt. Stip." refers to the thirty-nine (39) stipulated facts between the parties, dated November 14, 1973.

the compensation of its hourly employees without regard to any law, rule or regulation of the United States is contained in the 1945 amendments to the Bonneville Project Act (Act of October 23, 1945, 59 Stat. 546, 547). Id. at 6.

Petitioners assert this specific power has been repealed by the Classification Act of 1949.

Sunday premium pay for those employees to whom it is applicable was established by Section 405 of the Federal Employees Salary Act of 1966 (80 Stat. 288). Each of the petitioners are asserting a claim for additional pay at the rate of twenty-five percent (25%) of his hourly rate of basic pay for each hour of work performed during an eight (8) hour period of service, any part of which occurred on a Sunday. Id. at 8.

From July 18, 1966 to the present, petitioners were paid on a basis of a forty (40) hour week at hourly rates of pay. Id. at 9.

Employees of other Government agencies, more particularly those of the Bureau of Reclamation (like Bonneville, an agency administered by the United States Department of the Interior), and those of the United States Army Corps of Engineers, are engaged in similar work in the vicinity and receive extra compensation at the rate of twenty-five percent (25%) of each of that agency's basic rate of compensation for Sunday work. Id. at 10. None of petitioners received any premium compensation for Sunday work as that term is used in the Federal Employees Salary Act of 1966. Id. at 9.

Bonneville has denied liability for Sunday premium pay for petitioners on the grounds that Section 405 of the Federal Employees Salary Act of 1966 is not applicable to petitioners. Id. at 10.

Petitioners instituted this suit in the Court of Claims on June 26, 1972, Id. at 10, seeking 25 percent Sunday

premium back pay for work performed from July 18, 1966 to the present time, as required by Section 405(f) of the Federal Employees Salary Act of 1966, 5 U.S.C. §5544(a).

The Court of Claims, in a 2-1 decision, held that petitioners could not recover on the basis that the 1945 law [Section 10(b) of the Bonneville Project Act] was not repealed by the Classification Act of 1949, and therefore, petitioners' wages may be fixed without regard to Section 405(f) of the Federal Employees Salary Act of 1966, 5 U.S.C. §5544(a). (App. A, *infra*, p. 11a).

REASONS FOR GRANTING CERT

The Court of Claims in this case has erroneously superseded the 1959 Civil Service Commission final determination interpreting the Classification Act of 1949 as it relates favorably to the laborers and mechanics of Bonneville. This action has departed from the accepted course of judicial review of the Commission's expertise and will seriously impair the Commission's future ability to administer the Classification Act of 1949 pursuant to the statutory framework and legislative intent of that Act. Moreover, this Court should decide the important question of Federal law (not yet decided by this Court or any other court except the Court of Claims in this case), namely: Whether any federal agency, including Bonneville, can totally disregard the Classification Act of 1949 and a Civil Service Commission final determination specifically authorized by that Act, in setting wages for its federal employees.

I.

THE DECISION OF THE COURT OF CLAIMS IMPROPERLY SANCTIONED BONNEVILLE'S TOTAL DISREGARD OF THE CLASSIFICATION ACT OF 1949 AND A CIVIL SERVICE COMMISSION FINAL DETERMINATION SPECIFICALLY AUTHORIZED BY THAT ACT WHEN IT ERRONEOUSLY SUPERSEDED THE STATUTORY POWERS OF THE COMMISSION TO DETERMINE FINALLY WHETHER A FEDERAL EMPLOYEE IS COVERED OR EXEMPTED BY THE 1949 ACT.

Petitioners contend the Civil Service Commission, in response to an opinion solicited from the Commission by the Comptroller General, issued a final determination in 1959 that Section 10(b) of the Bonneville Project Act, as amended, Section 5(b) of the Act of October 23, 1945, was superseded by the Classification Act of 1949.² Thus, there existed a Commission position in favor of the Bonneville employees adverse to Bonneville. This was a final determination and binding on Bonneville. However, Bonneville has never followed this final determination.

Judge Davis, in his dissenting opinion in the Court of Claims decision below, succinctly stated:

For me the crucial feature of this case is Section 203 of the Classification Act of 1949, 63 Stat. 956, 5 U.S.C. §5103 (1970), which provides (as it now appears in the Code) that "[t]he Civil Service Commission shall determine *finally* the applicability of section 5102 of this title [§§201 and 202 of the 1949 Act] to specific positions and

²The full text of the Commission's two-page final determination is found in App. C, *infra*, p. 1c.

employees, except for positions and employees in the Office of the Architect of the Capitol" [emphasis added]. I take this to mean what it says—that the Civil Service Commission is the final arbiter. There is not the slightest constitutional impediment to such a provision by Congress where the substantive legislation concerns federal employees and the Commission decides in favor of employees' rights. That is what the Commission has explicitly done, with respect to the very question before us, in a case in which its view was officially requested and it had to pass directly on the issue. The court thinks the Commission was wrong, but section 203 seems to me to foreclose our superseding the Commission's position in favor of the employees, at the instance of the employing agency, even through the problem is a legal one. This is, as I see it, the mandate of Congress. Under the law the Bonneville Power Administration was required to follow the Commission's directive favoring the employee. All the decisions holding that there is some sort of judicial review, despite "finality" language comparable to that here, are cases in which the Commission (or other agency) decided adversely to the employee.³

Supportive of Judge Davis' reasoning is the Administrative Procedure Act, 5 U.S.C. § 702, which specifically limits the right of review to "any person suffering legal wrong because of an agency act or adversely affected and grieved by such action." A "person" is defined to include individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. 5 U.S.C. § 551(2). An "agency" is defined to include each authority of the Government of the United States. 5 U.S.C. § 701(b)(1). Thus, an "agency," including Bonneville, would be precluded

³ App. A, *infra*, p. 24a.

from review of the 1959 Commission final determination adverse to Bonneville under 5 U.S.C. § 702.

This is not to say an agency can never seek judicial review of an administrative determination. An agency may seek judicial review of an administrative determination, but *only when Congress expressly authorizes* judicial review.⁴ Congress did not so provide for Bonneville.

It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definitive action.⁵ Unless the vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.⁶

The excuse given by the court majority for infringing on the Commission's statutory power was that the Commission's determination was clearly "a misconstruction of the governing legislation."⁷

⁴ Under the Indian Claims Commission Act, 25 U.S.C. § 70, s.(b), *either party* (the Indian tribe or the Government), may appeal from the determination of the Commission to the Court of Claims.

⁵ *Gray v. Powell*, 314 U.S. 402, 412 (1941).

⁶ *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134, 144 (1940).

⁷ App. A., *infra*, p. 18a. However, the case relied on by the court dealt with judicial review sought by a civilian government worker, not the agency. This strengthens the argument in Judge Davis' dissent that judicial review of an agency decision is allowed only when the agency has decided adversely to the employee (App. A., *infra*, p. 24a), or a specific statute allows the agency judicial review. Cf. n.4 *supra*.

In fact, it is the court's majority which has "misconstrued" both the Commission's 1959 final determination adverse to Bonneville and the Classification Act of 1949. The 1959 Commission final decision, on which petitioners rely, cited Sections 201(b) and 1106(a) and 1106(b) as the statutory authority for its final determination adverse to Bonneville, as follows:

Section 201(b) of the Classification Act of 1949 provides that "Subject to the exemptions specified in section 202, and except as provided in sections 204 and 205, this Act shall apply to all civilian positions, officers, and employees in or under the departments." Attention is also invited to the provisions of section 1106 of the Act:

"(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act. * * *

"(b) The application of this Act to any position, officer, or employee shall not be affected by reason of the enactment of subsection (a)".

Thus, all exceptions from the Classification Act of 1923 were superseded by the 1949 Act, and no exceptions from the 1949 Act were made unless they were specified in section 202.⁸

There is a presumption against interpreting a statute in a way which renders it ineffective. *F.T.C. v. Manager, Retail Credit Company, Miami Branch Office*, 515 F.2d 988, 994 (D.C. Cir. 1975). Yet, the Court's majority

⁸ App. C., *infra*, p. 27a. When faced with a problem of statutory construction, great deference is to be shown to the interpretation given the statute by the agency charged with its administration. A court need not find that the agency's construction is the only reasonable one, or even that it is the result the court would have reached had the question arisen in the first instance in judicial proceedings. *Udall v. Tallman*, 380 U.S. 1 (1965).

erroneously failed to even mention subsection 1106(b) in its opinion,⁹ though that subsection controls the effect of subsection 1106(a), *supra*. The 1949 Act and Section 1106 in particular can make statutory sense only when both subsections 1106(a) and 1106(b) are considered together. *General Motors Acceptance Corporation v. Whisnant*, 387 F.2d, 774, 778 (5th Cir. 1968); *Smither and Company, Inc. v. Coles*, 100 U.S. App. D.C. 68, 70, 242 F.2d 220, 222, *cert. denied*, 354 U.S. 914 (1957). The failure of the court to consider and apply subsection 1106(b) of the Classification Act of 1949 to that Act's effect on pre-existing exemptions (including Bonneville), resulted in the court majority itself being misguided so as to "misconstrue the governing legislation [Classification Act of 1949]."¹⁰

This Court has previously given weight to the recodification of statutes by the House Committee on the Revision of Laws in support of this Court's decisions. *United States v. Bergh*, 352 U.S. 40 (1956). The proper interpretation of sections 1106(a) and (b) of the Classification Act of 1949 (an interpretation on which petitioners rely but which the court's majority failed to give because it erroneously ignored or otherwise misconstrued section 1106(b) of that Act), was given by Edward F. Willett, Jr., Law Revision Counsel, U.S. House of Representatives, in pertinent part as follows:

1. . . . [S]ection 1106 of the 1949 Act was a technical section appearing in Title XI, "General Provisions," rather than in the "Coverage and Exemptions" title, Title II of the Act. Subsection (a) of section 1106 was a short cut fashioned by the draftsman to conform to the 1949 Act those

⁹ App. A., *infra*, pp. 15a-17a.

¹⁰ App. A., *infra*, p. 18a.

references in other laws to the 1923 Act without having to identify and specifically amend all the laws where references to the 1923 Act appeared. That it was not intended to provide exemptions beyond those carried in Title II of the 1949 Act is clear from the language of subsection (b). That language ensures that subsection (a) would not have the effect of providing exemptions to the 1949 Act that were additive to those contained in Title II.

2. With respect to *any law* containing an exemption from the 1923 Act, it is the opinion of Affiant, who holds the office of Law Revision Counsel, formerly the Law Revision Counsel of the House Judiciary Committee, that the substitution referred to in Section 1106(a) is, by virtue of Section 1106(b), proper *only if* a corresponding exemption can be found in Title II of the 1949 Act. If a corresponding exemption is not found in Title II, then the exemption from the 1923 Act is not an exemption from the 1949 Act, and a substitution under Section 1106(a) is not authorized. A substitution in such a law, without a corresponding exemption contained in Title II of the 1949 Act, would have contravened Section 1106(b) because the substitution would have affected the application of the 1949 Act solely by reason of the substitution.

Support for this interpretation is contained in the legislative history of the 1949 Act. Senate Report No. 847, 81st Congress, 1st Session (1949) on S. 2379, the Senate bill, reads as follows on page 30:

The general plan of Title II is to express a comprehensive general coverage in Section 201, subject to specific exemptions in Section 202. Thus, in order for a department, or a group of positions or employees in or under a department, to be exempted from the bill, an express exemption must be found, either in

Section 202 or in some other provision of *future law*. [Emphasis supplied.]

See, also, House Report No. 1264, 81st Congress, 1st Session (1949) on H.R. 5931, the companion House bill that was enacted as the Classification Act of 1949, that reads on page 5:

In addition, a large number of individual exemptions in organic or appropriation Acts, such as exemptions for attorneys, engineers, experts, etc., in certain agencies would be repealed by implication and the positions brought within the bill.¹¹

Thus, the majority of the Court of Claims in this case has improperly departed from the accepted course of judicial review, *Gray v. Powell, supra*, 314 U.S. at 412; *F.C.C. v. Pottsville Broadcasting Company, supra*, 309 U.S. at 144, by illegally infringing on the Commission's powers specifically authorized by the Classification Act of 1949, 5 U.S.C. §5103, to determine finally the applicability of that Act to Bonneville and petitioners. Petitioners' Cross-Motion for Summary Judgment should have been granted and that of respondent denied.

¹¹ The full text of the Willett Affidavit is found in App. D., *infra*, pp. 1d-5d.

WHETHER THE CLASSIFICATION ACT OF 1949 REPEALED THAT PORTION OF THE BONNEVILLE PROJECT ACT, AS AMENDED IN 1945, WHICH HAD GIVEN BONNEVILLE THE POWER TO FIX PETITIONERS' WAGES WITHOUT REGARD TO ANY OTHER LAWS, RULES OR REGULATIONS RELATING TO THE PAYMENT OF EMPLOYEES OF THE UNITED STATES.

Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In this case, the Court of Claims majority erroneously ignored the clear intention of Congress to repeal all previous laws inconsistent with the Classification Act of 1949, specifically that portion of section 10(b) of the Bonneville Project Act of 1937 *as amended*, which provided that the administrator of Bonneville could employ laborers, mechanics and workmen "... and fix their compensation without regard to the Classification Act of 1923, and any other laws, rules, or regulations relating to the payment of employees of the United States."¹²

Two acts upon the same subject must stand together, *if possible*, but a later act will repeal an earlier one

¹²Section 10(b) of the Bonneville Project Act, 50 Stat. 731, as amended by Section 5(b) of the Act of October 23, 1945 (57 Stat. 547), 16 U.S.C. §832i (1970).

insofar as the provisions of the later act are repugnant to those of the earlier act if the acts are repugnant in *any* of their provisions. *Steed v. Roundy*, 342 F.2d 159, 161 (10th Cir. 1965).

Congress expressly prohibited the co-existence of the Classification Act of 1949 with those provisions of section 10(b) of the Bonneville Project Act which petitioners contend were repealed. This express Congressional intent is found in the following sections of the 1949 Act: Section 201 now codified as 5 U.S.C. 5102(b); Section 202(7) now codified as 5 U.S.C. 5102(c)(7); and Sections 1106(a) and 1106(b).

5 U.S.C. §5102(b) states: "*Except as provided by subsections (c) and (d) of this section, this chapter applied to all civilian positions and employees in or under an agency.*" [Emphasis supplied.] 5 U.S.C. §5102(a)(1) lists eight specific entities not included in the definition of "agency." Bonneville, which is within the Department of the Interior, 16 U.S.C. 832(a), is not listed, although two other Interior Department bodies are listed.¹³

The Congressional purpose is clear that all exemptions to the provisions of the Classification Act of 1949 must be expressly found in the text of that statute. Any exemption which relies on an independent source of exemption for federal civilian employees (as respondent contends) is irreconcilable with the plain meaning of the statute and legislative history of the 1949 Act and is repealed. Judicial interpretation of legislative intent should be consistent with the plain language of a statute. *National Petroleum Refiners Association v.*

¹³Alaska Railroad, 5 U.S.C. 5102(a)(1)(iii), and the Virgin Islands Corporation, 5 U.S.C. 5102(a)(1)(iv).

F.T.C., 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

Thus, the majority of the Court of Claims holding that section 10(b) of the Bonneville Project Act dealing with the fixing of compensation was not repealed by the Classification Act of 1949 (App. A., *infra*, p. 11a), renders the express statutory scheme of the 1949 Act ineffective and is therefore erroneous.¹⁴

III.

PETITIONERS ARE BEING UNLAWFULLY DENIED 25 PERCENT SUNDAY PREMIUM PAY REQUIRED BY SECTION 405(f) OF THE FEDERAL EMPLOYEES SALARY ACT OF 1966, 5 U.S.C. §5544(a).

The purpose of Chapter 51, 5 U.S. Code, which includes 5 U.S.C. 5102(c)(7), *infra*, is to provide a plan for classification of positions whereby the principle of equal pay for substantially equal work will be followed throughout all civilian positions of the federal government (Bonneville included). 5 U.S.C. §5101(1)(A). Petitioners contend Congress specifically intended to benefit *all* wage board employees in the 1966 Act regardless of other pay rules and regardless of prevailing rates or practices in the private sector.

Section 405(f) of the Federal Employees Salary Act of 1966, 5 U.S.C. §5544(a), provides 25 percent Sunday premium pay to all federal prevailing rate employees except those who work for agencies specifically

¹⁴ Petitioners allege the court completely misread section 1106 of the 1949 Act by ignoring subsection 1106(b), the controlling subsection. See Petition, *supra*, pp. 17-19.

listed in 5 U.S.C. 5342(a)(1)(A-I). Bonneville is not listed as being among these excepted agencies.¹⁵ Petitioners are "prevailing rate employees" as defined in 5 U.S.C. §5342(a)(2)(A) and (b)(2)(A). Since prevailing rate employees are those civilian employees exempted from classified federal positions under Section 207(7)¹⁶ of the Classification Act of 1949, 5 U.S.C. §5102(c)(7), and since petitioners are included in that exemption, petitioners are entitled to Sunday premium pay expressly provided to all prevailing rate employees. 5 U.S.C. §5544(a).

Thus, the majority opinion of the Court of Claims violates the express language of 5 U.S.C. §5341(1) that there will be equal pay for substantially equal work for all prevailing rate federal employees who are working under similar conditions of employment in all federal agencies within the same local wage area.

Applying this statutory mandate to the facts of this case, since the Bureau of Reclamation (like Bonneville, an agency administered by the Department of Interior) and Corps of Engineers employees are engaged in work • similar to petitioners in the local wage area and receive 25 percent Sunday premium pay (Jt. Stip. at 10), the petitioners should also be entitled to receive equal pay for substantially equal work. Thus, petitioners are entitled to 25 percent Sunday premium pay, in accordance with 5 U.S.C. §5544(a). The Court of Claims decision should be reversed.

¹⁵ Both "the Alaska Railroad" and "the Virgin Islands Corporation" are within the Department of Interior, as is Bonneville. Yet Bonneville had not specifically been excluded in §5342(a)(1), as was the Alaska Railroad and the Virgin Islands Corporation. Thus, Bonneville is subject to 5 U.S.C. §5343 and 5 U.S.C. §5544(a).

¹⁶ 5 U.S.C. §5342(b)(2)(A).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A

In the United States Court of Claims

(Decided June 25, 1975)

No. 261-72

LEROY W. ABELL, ET AL. v. THE
UNITED STATES

No. 371-73

JACK R. BARGER, ET AL. v. THE
UNITED STATES

David Minton for plaintiff; *Robert A. Saltzstein*, attorney of record. *Wyatt, Saltzstein, Minton and Howard; Paul G. Olsen, Jones, Olsen & Christensen; and Arnold Olsen*, of counsel.

Francis H. Clabaugh, with whom was *Assistant Attorney General Carla A. Hills*, for defendant. *Lawrence Cox*, of counsel.

Before DAVIS, SKELTON, and KASHIWA, *Judges*.

ON PLAINTIFFS' MOTION AND DEFENDANT'S CROSS MOTION FOR
SUMMARY JUDGMENT

KASHIWA, *Judge*, delivered the opinion of the court:

Plaintiffs, wage board employees of the Bonneville Power Administration of the Department of the Interior (hereinafter Bonneville), claim in this suit that they are being denied 25 per cent Sunday premium pay required by Section 405(f) of the Federal Employees Salary Act of 1966 (5 U.S.C. § 5544(a)) and alternatively that if they are not entitled to 25 per cent Sunday premium pay under this act,

they are nonetheless entitled to it because "the prevailing rates in the industry provide for premium pay for Sunday work" and Bonneville is required to fix compensation for plaintiffs in accordance with the prevailing rates in the public electrical utilities industry in the Pacific Northwest.

This is a consolidation of the cases of *Barger, et al. v. United States*, Ct. Cl. No. 371-73, and *Abell, et al. v. United States*, Ct. Cl. No. 261-72. There is no genuine issue as to any material fact. Essential facts have been stipulated. Parties have filed cross motions for summary judgment. We hold for the defendant in both cases, allowing defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment.

The stipulated facts are as follows. Bonneville was started and established under the Act of August 20, 1937 (50 Stat. 731, as amended, 16 U.S.C. §§ 832-832l (1970)), within the Department of the Interior. It is required and charged by statute, Executive order, and orders of the Secretary of the Interior with responsibility for marketing electric power generated from Federal hydroelectric projects in the Pacific Northwest (Bonneville Project Act, Act of August 20, 1937, 50 Stat. 731, as amended, 16 U.S.C. §§ 832-832l (1970); § 2 River and Harbor Act of 1945, Act of March 2, 1945, 59 Stat. 10, 22; § 5 Flood Control Act of 1944, Act of December 22, 1944, 58 Stat. 887, 890; Executive Order No. 8526, 5 Fed. Reg. 3390 (1940); Secretarial Order No. 2860, as amended, 27 Fed. Reg. 591 (1962), 28 Fed. Reg. 5273 (1963), 31 Fed. Reg. 13560 (1966)). To fulfill these responsibilities, Bonneville has constructed, operates and maintains a major electrical transmission system which exceeds 12,000 miles. It has also constructed appropriate load dispatching centers and substations throughout the states of Oregon, Washington, Idaho and Montana, the geographic area of its system. The transmission lines and related electric facilities represent an investment of more than \$1.2 billion. Investment in electrical generation facilities for which Bonneville has the repayment obligation is an additional \$1.9 billion. Total system revenues for 1973 exceeded \$177.4 million.

Bonneville employs about 3,828 employees, 1,400 of whom are hourly employees whose compensation is fixed through

collective bargaining, to operate and maintain this vast system which includes more than 200 load dispatching centers or substations, 50 of which are manned by dispatchers, operators and relief operators seven days a week throughout the year. Over one-half of these are manned continuously, 24 hours a day. These dispatchers, operators and relief operators are hourly employees whose rates of compensation are fixed through contract negotiation between Bonneville and the Columbia Power Trades Council (hereinafter the union), a council composed of 16 unions including the International Brotherhood of Electrical Workers.

Bonneville's hourly employees are appointed in accordance with the Civil Service laws of the United States and for purposes of retirement, sick leave, annual leave, severance pay, workmen's compensation and other benefits are treated substantially the same as annual employees. Only in the significant area of compensation do these employees differ markedly. Since 1945 their compensation has been arrived at by collective bargaining and fixed without regard to any other law, rule or regulation of the United States. The initial authority for Bonneville to undertake collective bargaining and to fix the compensation of its hourly employees in this fashion is contained in the 1945 amendments to the Bonneville Project Act (Act of October 23, 1945, 59 Stat. 546, 547), and defendant claims that the authority has remained unchanged.

Between 1937 and 1945 the laborers, mechanics and workmen employed by Bonneville were true wage board employees. They were excluded from coverage of the 1923 Classification Act. Their rates of pay were fixed by administrative action. After 1945, pursuant to the above-referenced amendments, their compensation was fixed through collective bargaining. To develop a base for negotiations, Bonneville surveyed utilities within the Pacific Northwest employing similar crafts. At some time subsequent to 1945, Bonneville and the union representing Bonneville's hourly employees adopted the practice of making a joint survey. Representatives of Bonneville and the union cooperate in preparing this survey. Originally, only six utilities were surveyed; however, when the joint survey was expanded to include the United States Bureau of

Reclamation and the Corps of Engineers, the number of utilities was increased to eight. These include the four largest private electric utilities in the Pacific Northwest—Pacific Power & Light Company, Portland General Electric Company, Puget Sound Power & Light Company and the Washington Water Power Company; two large public utility districts (hereinafter PUD) which have significant electrical generation—Grant County PUD and Chelan County PUD; and the two largest municipally owned electric utilities—Seattle City Light and Tacoma City Light.

The Bureau of Reclamation uses this survey to negotiate wage rates for employees employed at Grand Coulee, Washington; and the Corps of Engineers submits this survey data to a wage-fixing authority in Washington, D.C., which establishes wage rates for the Northwest.

The current collective bargaining agreement between the union, which is the exclusive representative for the class which includes all plaintiffs, does not provide for Sunday premium pay for Bonneville's hourly employees. Agreements have been negotiated each year since the enactment of Section 405(f) of the Federal Salary and Fringe Benefits Act of 1966 (80 Stat. 288) (now codified as 5 U.S.C. § 5544(a) (1966)), establishing the Sunday premium. The benefit which plaintiffs claim has never been included in any negotiated agreement. It was specifically requested by the union during the 1967 annual contract negotiations between Bonneville and the union and rejected by Bonneville on the ground that the current wage survey indicated it was not a prevailing rate. Since that date the union has not requested this Sunday premium pay in its annual negotiations.

During all of the period of employment set forth in plaintiffs' petition, plaintiffs were paid on the basis of a 40-hour week at hourly rates of pay. None of the plaintiffs received any premium compensation for Sunday work as that term is used in the Federal Salary and Fringe Benefits Act of 1966, enacted July 18, 1966.

The normal schedule of those plaintiffs who work rotating shifts in positions which are manned around the clock, seven days per week, requires that each work approximately 39 Sundays per year from July 18, 1966.

The normal schedule for those plaintiffs who occupy positions at 24-hour call stations requires that each work approximately 26 Sundays per year from July 18, 1966.

Plaintiffs originally filed their petition alleging that Public Law 89-504, 5 U.S.C. § 5544(a) (1966), required payment to them by Bonneville of 25 per cent premium pay for Sunday work. By amendment dated December 6, 1972, plaintiffs further allege that if 5 U.S.C. § 5544(a) is not applicable to them, they are nonetheless entitled to 25 per cent Sunday premium pay "because the prevailing rates in the industry provide for premium pay for Sunday work" and Bonneville is required to fix the compensation for plaintiffs in accordance with the prevailing rates in the electrical utility industry. Defendant's answer, denying plaintiffs' allegations, was filed on August 23, 1972. Plaintiffs' motion for summary judgment was filed March 27, 1974. Defendant's cross motion for summary judgment was filed September 10, 1974.

We shall now turn to the first and primary issue in this case: Whether plaintiffs, who are wage board employees of Bonneville, are entitled to 25 per cent premium pay for working on Sunday pursuant to Public Law 89-504, 5 U.S.C. § 5544(a), enacted July 18, 1966.

In order to fully understand the statutory construction problem presented in this case, it is necessary to have a clear picture of the creation of Bonneville in 1937 and of the events which took place thereafter until the passage of the Act of October 23, 1945 (hereinafter the 1945 Act). These facts are well summarized in the defendant's brief and since plaintiffs do not dispute these basic facts, we shall quote from Defendant's Cross Motion for Summary Judgment, at pp. 9a-14 (footnotes and emphasis omitted):

Bonneville's organic legislation, enacted in 1937, originally provided:

"Sec. 10. The Administrator, the Secretary Of War, and the Federal Power Commission, respectively, shall appoint such attorneys, engineers, and other experts as may be necessary for carrying out the direction [sic: functions] entrusted to them under the [sic: this] Act, without regard to the provisions of the civil service laws and shall fix the compensation of each of such attorneys, engineers and other experts at not to exceed \$7,500 per

annum; and they may, subject to the civil service laws, appoint such other officers and employees as may be necessary to carry out such functions and fix their salaries in accordance with the Classification Act of 1923, as amended. (59 Stat. 547)" [sic: 50 Stat. 731, 736]

During the initial years of operation, Bonneville experienced problems in recruiting and retaining the skilled and semi-skilled workmen essential for operation of its complex facilities. Bonneville was a utility competing directly with industry and private utilities in the Pacific Northwest for these workmen. It found it could not compete.

Private utilities paid time and one-half for overtime. Bonneville could not. Private utilities paid a minimum of two hours pay when an employee was called back because of an emergency. Bonneville could not. Private industry paid a night differential. Bonneville could not. Private utilities which did not pay a night differential effectively increased pay by allowing eight hours pay for seven and one-half hours' work. Bonneville could not. Private utilities paid for time its employees spent in travel required by system emergencies. Bonneville could not. Bonneville could pay only for time actually worked and time spent in traveling was, and generally still is, not considered work under the rules applicable to Government employees. Private utilities could pay daily overtime and paid time and one-half for all Sunday overtime. Bonneville could not. Under temporary war powers Bonneville met this practice. But this authority was temporary and upon expiration the controlling law was Section 23 of the 1934 Independent Offices Appropriation Act, Act of March 28, 1934, 48 Stat. 509, 522, (then codified as 5 U.S.C. § 673c) (See 20 Comp. Gen. 392 (1940)). Under that statutory provision payment of overtime for wage board employees was limited to those hours worked in excess of 40 hours per week.

In 1945, to ameliorate many of its problems, Bonneville went to Congress seeking extraordinary authority to enable it to successfully compete within the utility industry in the Pacific Northwest. It was successful in having H.R. 2690 enacted as Public Law No. 201, 79th Cong., 1st Sess. (1945).¹ This legislation was justified in

¹ Said act as pertinent herein reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 (f) of the Act of August 20, 1937 (50 Stat. 731), as amended by the Act of March 6, 1940 (54 Stat. 47), is hereby amended to read as follows:

part before the House of Representatives by the then General Counsel for Bonneville. He testified:

"The Bonneville Power Administration is not carrying out a government regulatory program. It is engaged in a large scale business enterprise * * *.

"Ordinary Government procedure was not designed for use in a business operation of that nature and magnitude, and it has hampered the Administrator to an unwarranted extent. H.R. 2690 and H.R. 2693 are based on the premise that Bonneville is a regional and business agency, and they will permit it to operate in a more businesslike manner * * *.

"Because of the nature of the business in which the Administrator is engaged, his activities are constantly being compared with those of private utilities and private contractors. With respect to labor practices he suffers by comparison. The Administration operates and maintains electric facilities and occasionally undertakes construction work on force account. He should be able to follow the same, or comparable, labor practices as do private utilities and contractors in the same work. H.R. Rep. No. 2690, 79th Cong., 1st Sess. 3 (1945)."

(Similar comments appear in the Senate and House Reports on H.R. 2690 (S. Rep. No. 469, 79th Cong., 1st Sess. (1945); H. Rep. No. 777, 79th Cong., 1st Sess. (1945)).

Congress recognized the unique status of Bonneville and by the 1945 amendments Bonneville obtained the extraordinary authority required. The Administrator was granted the right to modify, adjust, cancel or compromise contracts or agreements he entered under the Bonneville Act. He could settle, compromise or pay claims against Bonneville arising out of the acts of em-

"SEC. 5. Section 2 (a) of the said Act is hereby amended by striking the language inserted by section 1 of the Act of March 6, 1940 (54 Stat. 47); and section 10 of the said Act is hereby amended to read as follows:

"(b) The Administrator, the Secretary of War, and the Federal Power Commission, respectively, are authorized to appoint, subject to the civil-service laws, such officers and employees as may be necessary to carry out the purposes of this Act, the appointment of whom is not otherwise provided for, and to fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities (hereinafter called 'laborers, mechanics, and workmen'), subject to the civil-service laws, and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States except the Act of May 29, 1930 (46 Stat. 468), as amended, to the extent that it otherwise is applicable." * * *

ployees. He could accept voluntary services. And, for the purpose of this action, the most significant change, he could:

"* * * [E]mploy laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities (hereinafter called 'laborers, mechanics and workmen') subject to the civil service laws, and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States, except the Act of May 29, 1930 (46 Stat. 468), as amended, to the extent that it otherwise is applicable * * *."

Since 1945 Bonneville has thus had the latitude and authority necessary to provide fair and equitable compensation for its hourly employees, including plaintiffs, at rates consistent with those paid in the utility area it served even if this should be inconsistent with pay practices for other federal employees. This authority was granted by Congress with the full realization that Bonneville sought to deviate substantially from the usual pay practices of the Federal Government. It was special legislation enacted to enable Bonneville to function as and compete for employees with private electrical utilities in the Pacific Northwest.

We now leave the 1945 Act and discuss an act of Congress passed in 1949 known as the Classification Act of 1949 (Act of October 28, 1949, 63 Stat. 954). The act as material herein provides as follows:

TITLE I—DECLARATION OF POLICY

SEC. 101. It is the purpose of this Act to provide a plan for classification of positions and for rates of basic compensation whereby—

(1) in determining the rate of basic compensation which an officer or employee shall receive, (A) the principle of equal pay for substantially equal work shall be followed, and (B) variations in rates of basic compensation paid to different officers and employees shall be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of officers and employees to efficiency and economy in the service; and

(2) individual positions shall, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined in section 301, and the various classes shall be so

described in published standards, as provided for in title IV, that the resulting position-classification system can be used in all phases of personnel administration.

TITLE II—COVERAGE AND EXEMPTIONS

SEC. 201. (a) For the purposes of this Act, the term "department" includes (1) the executive departments, (2) the independent establishments and agencies in the executive branch, including corporations wholly owned by the United States, (3) the Administrative Office of the United States Courts, (4) the Library of Congress, (5) the Botanic Garden, (6) the Government Printing Office, (7) the General Accounting Office, (8) the Office of the Architect of the Capitol, and (9) the municipal government of the District of Columbia.

(b) Subject to the exemptions specified in section 202, and except as provided in sections 204 and 205, this Act shall apply to all civilian positions, officers, and employees in or under the departments.

SEC. 202. This Act (except title XII) shall not apply to—

* * * * *

(7) employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations * * * whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates;

* * * * *

Section 1201 of the said Classification Act of 1949 further states:

All laws or parts of laws inconsistent with this Act are hereby repealed *to the extent of such inconsistency*. [Emphasis supplied.]

Relying on said section 1201, plaintiffs' main thrust in this case is (we quote specifically from Plaintiffs' Brief in Support of Plaintiffs' Motion for Summary Judgment, at pp. 34-35):

That portion of the Act of October 23, 1945, which authorized the Administrator of Bonneville to fix wages of "laborers, mechanics, and workmen * * * without regard to the Classification Act of 1923, as amended, and any other laws, rules or regulations relating to the payment of employees of the United States" is as inconsistent with the Classification Act and the wage board ex-

emption clause in section 202(7) as the special authority of the Alaska Railroad or the Virgin Islands Corporation. The Congress did not see fit to exclude Bonneville as an agency, and therefore, its white collar employees were automatically subject to the Classification Act (which they are) and its wage board employees fell into the general exemption clause in section 202(7). *Being exempted by section 202(7) automatically subjects these wage board employees to the provisions of section 5544(a) requiring that regular Sunday duty be paid for at premium rates.* [Emphasis plaintiffs'.]

Plaintiffs' reference to section 5544(a) is 5 U.S.C. § 5544(a) (1966), which was amended by section 405(f) of the Act of July 18, 1966 (80 Stat. 298). The amendment was as follows:

The first paragraph of section 23 of the Independent Offices Appropriation Act, 1935, as amended (5 U.S.C. 673c), is amended by inserting immediately before the period at the end thereof the following: "Provided further, That employees subject to this section whose regular work schedule includes an eight-hour period of service any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday shall be paid extra compensation at the rate of 25 per centum of his hourly rate of basic compensation for each hour of work performed during that eight-hour period of service".

Defendant's reply to plaintiffs' foregoing thrust is as follows (quoting from Defendant's Reply to Plaintiffs' Response to Defendant's Cross Motion for Summary Judgment, at p. 7):

Plaintiffs' claim the authority given to Bonneville in 1945 by the Congress is inconsistent with that set forth in Section 202(7) of the 1949 Classification Act (Pltfs' Reply Br., p. 13). Plaintiffs, however, cite no provision of the 1949 Classification Act which is inconsistent with the extraordinary authority granted to Bonneville in 1945. All Section 202(7) of the 1949 Classification Act does is exclude skilled and semi-skilled workmen whose wages are fixed in accordance with prevailing rates consistent with the public interest. Nothing more. Where is the inconsistency? Plaintiffs were excluded from the Classification Act of 1923, and as a result of Section 202(7) were specifically exempted from the Classification Act of 1949. [Footnote omitted.]

Plaintiffs' counsel well argued the case before this court but when questioned specifically as to what is the incon-

sistency, his reply was not satisfactory. Plaintiffs' briefs do not specifically point to any inconsistency.

We agree with defendant for reasons hereinafter stated and hold that there is no inconsistency. Therefore, the 1945 law (Section 10(b) of the Bonneville Project Act) was not repealed and as amended by the Classification Act of 1949, reads as follows:

* * * The Administrator may employ laborers, mechanics and workmen in connection with construction work or the operation and maintenance of electrical facilities * * * subject to the civil service laws, and fix their compensation without regard to the Classification Act of 1949,¹²¹ and any other laws, rules, or regulations relating to the payment of employees of the United States. * * * [Emphasis supplied.]

We emphasize the portion which reads "without regard to * * * any other laws, rules, or regulations relating to the payment of employees of the United States" because the 1966 act which provided the 25 per cent for extra work on Sundays is a law relating to the payment of employees of the United States. Therefore, the result is plaintiffs' wages may be fixed without regard to the said 1966 act.

Plaintiffs' first and strongest argument in their opening brief was to point to the 1958 text of section 832i(b) of title 16, United States Code, and the historical note following section 832i.³ The 1958 text as noted in the historical note omits:

² The 1945 Act originally read "Classification Act of 1923" but Section 1106 of the 1949 Classification Act provided that references to the Classification Act of 1923 should henceforth be considered to mean the "Classification Act of 1949."

³ "The Administrator, the Secretary of the Army, and the Federal Power Commission, respectively, are authorized to appoint, subject to the civil service laws, such officers and employees as may be necessary to carry out the purposes of this chapter, the appointment of whom is not otherwise provided for, and to fix their compensation in accordance with the Classification Act of 1949. The Administrator may employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities (hereinafter called 'laborers, mechanics, and workmen'), subject to the civil-service laws. The Administrator is further authorized to employ physicians, under agreement and without regard to civil-service laws or regulations, to make physical examinations of employees or prospective employees who are or may become laborers, mechanics, and workmen. The Administrator, the Secretary of the Army, and the Federal Power Commission, respectively, are also authorized to appoint, without regard to the civil-service laws, such experts as may be necessary for carrying out the functions entrusted to them under this chapter."

Provisions of subsec. (b) which authorized the Administrator to fix the compensation of laborers, mechanics and workmen without regard to the civil-service laws and any other laws, rules, or regulations relating to the payment of employees of the United States * * *.

Since 16 U.S.C. § 832 and subparagraphs (a) to (l) thereunder, listed as Chapter 12B, specifically refer to the Bonneville Project only, plaintiffs naturally were led to believe that said section 832i(b) as codified and recited in footnote 3 was the present amended status of the statute. But errors do occur in codification and where there is a conflict between the codification and the Statutes at Large, the Statutes at Large must prevail.⁴ We held in *American Export Lines, Inc. v. United States*, 153 Ct. Cl. 201, 207, 290 F. 2d 925, 929 (1961):

It is well settled that "the Code cannot prevail over the Statutes at Large when the two are inconsistent." * * *

So the fact that 16 U.S.C. § 832i(b) as it is now codified eliminated the clause "fix the compensation of laborers, mechanics and workmen without regard to the civil-service laws and any other laws, rules, or regulations relating to the payment

(Continued)

The historical note following section 832i states:

"References in Text. The civil-service laws, referred to in the text, are classified generally to Title 5, Executive Departments and Government Officers and Employees.

"The Classification Act of 1949, referred to in the text, is classified to chapter 21 of Title 5.

"Codification. The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of act July 26, 1947, ch. 343, title II, 61 Stat. 501. Section 205(a) of act July 26, 1947, was repealed by section 53 of act Aug. 10, 1956, ch. 1041, 70A Stat. 641. Section 1 of act Aug. 10, 1956, enacted 'Title 10, Armed Forces' which in sections 3011-3013 continued the military Department of the Army under the administrative supervision of a Secretary of the Army.

"Provisions of subsec. (b) which authorized the Administrator to fix the compensation of laborers, mechanics and workmen without regard to the civil-service laws and any other laws, rules, or regulations relating to the payment of employees of the United States and which authorized the Administrator, the Secretary of the Army and the Federal Power Commission to fix the compensation of experts without regard to the Classification Act of 1949, were omitted since the positions referred to are now in the classified civil service and subject to the applicable compensation schedules."

"It has been held that even codification into positive law will not give the code precedence where there is a conflict between the codification and the Statutes at Large. *United States v. Welden*, 377 U.S. 95 (1964) (n. 4); *Stephan v. United States*, 319 U.S. 423 (1943); *Warner v. Goltz*, 293 U.S. 155 (1934); *Nashville Milk Co. v. Carnation Co.*, 238 F. 2d 86 (7th Cir. 1956), *aff'd* 355 U.S. 373 (1958); *Royer's, Inc. v. United States*, 265 F. 2d 615 (3rd Cir. 1959). The codification is only prima facie evidence of the law. 1 U.S.C. § 204a (1970).

of employees of the United States" is not controlling. The basic question still is whether the 1945 Act is inconsistent with the Classification Act of 1949.

Plaintiffs argue that there was a repeal by implication and give various reasons for the implication. As a general rule, repeals (not) by implication are disfavored. *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186 (1968); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Zacks*, 375 U.S. 59 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Federal Trade Comm'n v. A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Posadas v. National City Bank*, 296 U.S. 497 (1936); *Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971).

Within the past six months the Court in *Regional Rail Reorganization Act Cases*, 43 U.S.L.W. 4031 (U.S. Dec. 16, 1974), has stated at pp. 4040-41:

In sum, we cannot find that the legislative history supports the argument that the Rail Act should be construed to withdraw the Tucker Act remedy. The most that can be said is that the Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act.

One canon of construction is that repeals by implication are disfavored. See, e.g., *Mercantile National Bank v. Langbean*, 371 U.S. 565, 567 (1963); *United States v. Borden Co.*, 308 U.S. 188, 198, 199 (1939); *Amell v. United States*, 384 U.S. 158, 165-166 (1966). Rather, since the Tucker Act and the Rail Act are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, [417] U.S. [535], [551] (1974). Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court that

"A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. * * * This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to

insist on the legislature's using language showing that it has made a considered determination to that end. * * * [384] F. Supp., at [943].

The Court in *Morton v. Mancari*, *supra* at 550-51, also regarding repeal by implication stated:

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457 (1945). Clearly, this is not the case here. * * *

* * *

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. * * * The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

This court in *Casman v. United States*, 143 Ct. Cl. 16, 20, 181 F. Supp. 404, 406 (1958), stated:

It is a familiar rule that repeal by implication is found only by reason of necessity, and repeals by implication are consistently frowned upon. * * *

We must also remember that it is a recognized rule that special statutes will prevail over general statutes without regard to the priority of enactment. *General Dynamics Corp. v. United States*, 163 Ct. Cl. 219, 324 F. 2d 971 (1963):

General Motors Corp. v. United States, 155 Ct. Cl. 267, 292 F. 2d 502 (1961); *Panama Canal Co. v. Anderson*, 312 F. 2d 98 (5th Cir. 1963), *cert. denied*, 375 U.S. 832; *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957); *Bulora Watch Co. v. United States*, 365 U.S. 753 (1961); *United States v. Nix*, 189 U.S. 199 (1903). In *Morton v. Mancari*, *supra* at 550-51, the Court clearly stated the rule:

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. *Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.* See, e.g., *Bulora Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902). [Emphasis supplied.]

The legislative history of the 1945 amendments to the Bonneville Project Act demonstrates Bonneville was given special authority in matters of employees' pay not subject to the 1923 Classification Act. As the 1949 Classification Act was only a substitute for the earlier act and did not specifically repeal the 1945 special legislation amending the Bonneville Project Act, Bonneville's employees are still excepted from that act by Section 10(b) of the Bonneville Project Act. As above stated, special statutes will prevail over general ones without regard to priority of enactment.

During the argument and in their briefs, plaintiffs relied very much on a 1959 decision of the Comptroller General, reported in 38 Comp. Gen. 538 (1959), which stated at 542 that laborers and mechanics of Bonneville:

* * * are excepted from the Classification Act of 1949 by reason of paragraph (7) of section 202 of that act and not by the provisions of section 10 of the act of August 20, 1937, as amended, 16 U.S.C. 832i(b) * * *.

The question involved in that decision was whether Public Law 85-872 (now 5 U.S.C. § 5343 (1966)), which required wage determinations made by wage boards to be implemented within 45 days, was applicable to increases in compensation which were granted as a result of collective bargaining under

labor management agreements entered into by the following agencies in the Department of the Interior:

Alaska Railroad
Bonneville Power Administration
Southwestern Power Administration
Bureau of Mines
Bureau of Reclamation

The Comptroller General solicited the opinion of the Civil Service Commission (hereinafter CSC) which, under Section 203 of the Classification Act of 1949 (5 U.S.C. § 5103 (1966)), was "authorized and directed to determine finally the applicability of Sections 201 and 202" of the act. The CSC answered as shown below.⁵ Plaintiffs argue that the CSC ruled that Section 202(7) of the Classification Act of 1949 is the authority for fixing wage rates for Bonneville wage board employees. We do not agree. We interpret the CSC's views to mean that under the circumstances in which it arose, Bonneville employees were excluded from the coverage of the 1949 Classification Act by Section 202(7) of that act. That is all the Comptroller General ruled. The whole superseding argument of the CSC circulates around an obviously misguided interpretation of Section 1106(a) of the Classification Act of 1949. Section 1106(a) reads as follows:

(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act.

⁵ "• • • The Commission believes that this provision [referring to 10(b) of the Bonneville Project Act as amended, Section 5b of the Act of October 23, 1945] was superseded by the Classification Act of 1949.

"Section 201(b) of the Classification Act of 1949 provides that 'Subject to the exemptions specified in section 202, and except as provided in sections 204 and 205, this Act shall apply to all civilian positions, officers, and employees in or under the departments.' Attention is also invited to the provisions of section 1106 of the Act:

'(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act. • • •

"Thus all exceptions from the Classification Act of 1923 were superseded by the 1949 Act, and no exceptions from the 1949 Act were made unless they were specified in section 202. • • •

"Accordingly, it is our view that laborers and mechanics of the Bonneville Power Administration are excepted from the Classification Act of 1949 by reason of section 202(7) of that act." • • • [Emphasis supplied.]

The CSC interprets this simple section as superseding all exceptions to the Classification Act of 1923. The CSC concluded that since references to the Classification Act of 1923 mean the Classification Act of 1949, any exceptions referring to the 1923 act would only be exceptions to the 1949 act if listed as exceptions in that act. This is an unreasonable reading of Section 1106(a). Our interpretation is that all Section 1106(a) is doing is substituting the "Classification Act of 1949" for the "Classification Act of 1923" wherever reference to the "Classification Act of 1923" appears in any other statute. (See footnote 2.) This is the only reasonable interpretation of Section 1106(a). The CSC interpretation is misguided. It is significant that the misguided language of the CSC that the 1945 Act of Bonneville was "superseded" by the Classification Act of 1949 was not incorporated into the Comptroller General's opinion. Even though disregarded by the Comptroller General, plaintiffs urge the misguided "superseding" language of the CSC as controlling in this case. We cannot agree with plaintiffs.

The dissent expresses a view that Section 203 of the Classification Act of 1949 forecloses this court's superseding the CSC's interpretation. It is our view that the determination of whether a subsequent statute has, by implication, repealed a prior one is for the courts. *District of Columbia v. Hutton*, 143 U.S. 18, 27-28 (1892); *United States v. Claflin*, 97 U.S. 546, 549 (1878). Furthermore, in *Scroggins v. United States*, 184 Ct. Cl. 530, 533-534, 397 F. 2d 295, 297, cert. denied, 393 U.S. 952 (1968), this court in dealing with language similar to the language used in the case in a parallel situation involving the CSC stated as follows:

The Retirement Act provides (5 U.S.C. § 8347 (1964 Supp. II), formerly 5 U.S.C. § 2266) that "the Commission shall determine questions of disability and dependency" and its decisions "concerning these matters are final and conclusive and are not subject to review." This is a special and unusual restriction on judicial examination, and under it courts are not as free to review Commission retirement decisions as they would be if the "finality" clause were not there. We have said that, at best, a court can set aside the Commission's determination "only where there has been a substantial departure

from important procedural rights, a *misconstruction of the governing legislation*, or some like error 'going to the heart of the administrative determination.'" *Gaines v. United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962). * * * [Emphasis supplied.]

In the present case the CSC determination was clearly "a misconstruction of the governing legislation."

Defendant submits two additional decisions of the Comptroller General:

(1) The St. Lawrence Seaway Development Corporation decision (46 Comp. Gen. 176 (1966)) holding that the Seaway's practice of paying a 50 per cent premium for Sunday work had to be discontinued after the 1966 25 per cent Sunday premium law came into effect.

(2) The Veterans Administration decision of May 1, 1972, identified as B-175452, concerning a proposal relative to call-back overtime. The Comptroller held that since 5 U.S.C. § 5542 (1966) provides that "unscheduled overtime work performed by an employee on a day when work was not scheduled for him, or for which he is required to return to his place of employment, is deemed at least 2 hours in duration: * * *", a proposal by the American Federation of Government Employees for 4 hours overtime must be rejected as being not legally acceptable. The ruling was that "2 hours is therefore the maximum that may be paid in the absence of work beyond such period."

These two opinions illustrate exactly why Bonneville was given authority to fix the compensation of its "laborers, mechanics, and workmen * * * without regard to the Classification Act of 1923 [later 1949], as amended, and any other laws, rules or regulations relating to the payment of employees of the United States." At the time the 1945 Act was passed, the primary purpose was to give Bonneville a free hand in competing with the private utility companies in the Northwest region. This was especially so relative to matters relating to holiday pay, Sunday pay, overtime pay, call-back pay and other similar pay matters. This is clearly brought out in the hearings on H.R. 2690 and H.R. 2693, Bills to Amend the Bonneville Project Act (H.R. 2690 was passed October 23, 1945). C. Girard Davidson, General Counsel of

Bonneville, testified as shown below.⁶ A careful reading of the quoted testimony strengthens the defendant's argument that the 1945 Act was not only sensible but its purpose, to enable Bonneville to be in competition with private utilities in its labor-management problems, must be carried out.

One of defendant's arguments which plaintiffs have not been able to answer is that plaintiffs' position that there was

* "Ordinary Government procedure was not designed for use in a business operation of that nature and magnitude, and it has at times hampered the Administrator to an unwarranted extent. H. R. 2690 and H. R. 2693 are based on the premise that *Bonneville is a regional and business agency* and they would permit it to operate in a more business like manner.

"Most of the labor practices with which the Administrator cannot at present conform, and which put him in an unfortunate position in the present labor market, relate directly or indirectly to the compensation received by employees.

"1. Holiday pay: Bonneville can pay only straight time on holidays whereas private employers pay their employees time and one half for the same work. The difficulty is accentuated by the fact that Bonneville employees receive straight time on holidays within their regular tour of duty whether or not they work.

"2. Daily overtime: Bonneville can pay overtime only after 40 hours have been worked in one week. Under normal conditions it cannot pay overtime for more than 8 hours work in 1 day as do private utilities and contractors. Under the Government's broad war powers Bonneville is able to pay overtime for hours worked in excess of eight per day, but that authority, of course, is temporary.

"3. Emergency and call work: When an employee is called to work because of an emergency such as the breaking of a line, private utilities pay for a minimum of 2 hours regardless of whether an employee works a lesser time. Similar minimum payments are made for longer periods. Bonneville is unable to pay its employees on the same basis.

"4. Night differential: Bonneville cannot pay higher rates for night shifts as is done by some private employers.

"5. Multiple shifts: Other private employers and most private utilities do not pay a higher rate for night shifts, but accomplish night differential by allowing 8 hours pay for 7½ hours' work on the late shifts. Bonneville is unable to make such adjustments.

"6. Sunday overtime: Under the 40-hour statute Bonneville can pay overtime on Sundays only for time actually worked, not for travel. If an emergency develops at a distance from an employee's station, the employee can be paid only straight time while he is traveling from his station to the point of emergency, and then only if the travel occurs during his regular tour of duty. He may be paid time and one-half for the time he actually works at the point of emergency. Private utilities pay time and one-half for travel time as well as actual working time under similar conditions.

"Differences and discriminations such as those outlined naturally breed dissatisfaction and contribute to unsatisfactory labor relations. It is but a step further to active opposition by employees and labor, generally, to the activities and programs of the administration. The Administrator is engaged in a business enterprise, and he should be able to conform to labor practices which are customary in that business. The language suggested for the committee's consideration would permit him to do so." [Before House Comm. on Rivers & Harbors, 79th Cong., 1st Sess., at pp. 9-10.] [Emphasis supplied.]

an implied repeal is at direct odds with subsequent pronouncements by Congress. Defendant has incorporated into his moving brief a 70-page Report No. 192 of the Senate, 82nd Congress, 1st Session, entitled Labor-Management Relations in the Bonneville Power Administration, dated March 21, 1951. The Classification Act of 1949 was enacted October 28, 1949. Plaintiffs claim that the act repealed Section 10(b) of the 1945 Act. This Senate Report made only 17 months after the passage of the Classification Act of 1949, at p. 15, recites Section 10(b) of the 1945 Act:

* * * The Administrator may employ laborers, mechanics, and workmen in connection with construction work on the operation and maintenance of electrical facilities (hereinafter called "laborers, mechanics, and workmen"), subject to the civil-service laws, and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States * * *.

And with relation to said 1945 Act, the Report states as follows:

Part of the legislation just cited was brought into being in 1945, when the Bonneville Project Act was amended through Public Law 201, Seventy-ninth Congress, chapter 433, first session, when BPA found itself confronted with dissatisfaction on the part of its hourly and trade employees. The act creating BPA proved inadequate in meeting conditions confronting it. It did not make for good relations between labor and management. The 1945 amendments and other sections as dealt with in section V of this report, constituted an effort by Bonneville to correct a bad situation then in existence. [At p. 15.]

The Report was laudatory of Bonneville's labor relations program and it specially noted the 1945 changes. In the same session of the 81st Congress which passed the Classification Act of 1949, the Senate also passed Senate Resolution 140 which requested the above-mentioned Report. The Report is a report of the Committee on Labor and Public Welfare of the United States Senate. Since the Report is lengthy and required field studies, its preparation and completion ran into the 82nd Congress. When the Report was completed and is-

sued on March 21, 1951, during the 82nd Congress, 10 out of the then 13 members of the Committee on Labor and Public Welfare were Senators during the 81st Congress. In *Socony Mobil Oil Co. v. United States*, 153 Ct. Cl. 638, 646-647, 287 F. 2d 910, 914 (1961), this court stated:

* * * An expression of opinion as to the meaning of a statute, made some four years after the enactment of the statute by the same Congressional committee which had considered that statute at the time of its enactment, is an important circumstance for consideration in interpreting the statute. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329.¹

Therefore, we consider it "an important circumstance" that the Report of the Committee did not consider Section 10(b) of the 1945 Act repealed by the Classification Act of 1949. We are aware of circumstances mentioned in the footnote to the above quotation from *Socony Mobil Oil Co.*² This case is unlike the cases referred to in the said footnote in that the Report was ordered by the same Congress and session which passed the Classification Act of 1949, and 17 months thereafter the Report clearly treats Section 10(b) of the 1945 Act as still in force. The approval of the Report by the Senate Committee on Labor and Public Welfare of the 82nd Congress, made up of 10 senators (out of 13) of the 81st Congress, is material and must not be taken lightly.

In addition to the above-mentioned Senate Report, defendant calls our attention to Public Law 93-454 (October 18, 1974, 93rd Congress, 2nd Session), entitled Federal Columbia River Transmission System Act. The act permits Bonneville to use its revenues for expanding the transmission system and for its operation and maintenance. It also

¹ *United States v. United Mine Workers*, 330 U.S. 258, 281-282. Is not to the contrary. That case said only that the opinions of several Senators, some of whom had not been members of the Senate when the legislation in question had been considered, and none of whom had been members of the Committee which had reported the legislation and which opinions were expressed eleven years after the legislation had been passed, could not 'serve to change the legislative intent of Congress expressed' when the legislation had been passed. Similarly, *Rainwater v. United States*, 356 U.S. 590, 593, indicates only that an interpretation by one Congress of a statute passed by another Congress more than a half century before has 'very little, if any, significance.' See also the concurring opinion of Judge Littleton in the *Equitable Life Assurance Society v. United States*, 149 Ct. Cl. 316, 322, cert. denied 364 U.S. 829, and *A. P. Green Export Co. v. United States*, 151 Ct. Cl. 628."

authorizes the Administrator to issue revenue bonds and sell them to the Secretary of the Treasury to help finance construction. The bill contains a bonding limitation of \$1.25 billion. Passage of this act better enables Bonneville to meet its responsibilities under the regional Hydro-Thermal Power Program in that it no longer has to rely upon year-to-year funding through Congressional appropriations. Since the act authorizes the issuance of bonds, the act is carefully drawn and the legislation contains the following language:

* * * The provisions of the Government Corporation Control Act (31 U.S.C. 841 et seq.) shall be applicable to the Administrator in the same manner as they are applied to the wholly owned Government corporations named in section 101 of such Act (31 U.S.C. 846), but *nothing in the proviso of section 850 of title 31, United States Code, shall be construed as affecting the powers granted in subsection (b) (11) of this section and in sections 2(f), 10(b), and 12(a) of the Bonneville Project Act (16 U.S.C. 832 et seq.).* [Emphasis supplied.]

We quote the above fully realizing that the 1974 act is about 25 years after the enactment of the Classification Act of 1949 and fully aware of the passage in footnote 7. But in deciding whether a statute has been repealed by implication, we may consider the consequences of such repeal. *Doolittle v. Bryan*, 55 U.S. (14 How.) 563 (1852); *Burnet v. Guggenheim*, 288 U.S. 280 (1933); *Baltimore & Phila. Steamboat Co. v. Norton*, 284 U.S. 408 (1932); *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Clarke v. Rogers*, 228 U.S. 534 (1913). The Court in *Doolittle* noted that courts are especially averse to an implied repeal where a repeal may have an effect of unsettling titles to land. We refer to Public Law 93-454 of 1974 because it is an all-important financing act authorizing the issuance of \$1.25 billion in bonds by Bonneville. Technicalities in land titles are similar to technicalities in the issuance of bonds. We are also averse to an implied repeal where a basic bond issuance and authorization act of Bonneville, authorizing issuance of bonds up to \$1.2 billion, assumes by specific reference that the powers granted in Section 10(b) of the Bonneville Project Act still exist.

We have attempted to answer all of the major arguments by both parties. Plaintiffs have made other arguments such

as limited or temporary authority under Section 10(b) of the 1945 Act, plaintiffs are being denied equal pay for equal work, and others. We have considered all of them but our conclusion stated in the early part of this opinion remains unchanged. Section 10(b) was not repealed by the Classification Act of 1949.

In plaintiffs' amended complaint, plaintiffs allege Sunday premium pay "because the prevailing rates in the industry provide for premium pay for Sunday work" and Bonneville "is required under law and equity to set compensation for plaintiffs in accordance with prevailing rates in the industry." The affidavit of one Cosgrove C. LaBarre, labor relations officer for Bonneville for eight years, filed by defendant, dated February 21, 1973, shows that a survey of pertinent utilities in the Pacific Northwest in 1967 showed no premium payment for regularly scheduled Sunday work. A resurvey was made as late as February, 1973; it also showed that no premium is paid for regularly scheduled Sunday work. The affidavit further states that:

* * * In the 1967 contract negotiations between Bonneville and the Columbia Power Trades Council, in which I participated directly as the primary spokesman for Bonneville, a contract provision requiring payment of a premium of 25 per centum for work, any part of which was performed on Sunday was proposed by the Council. This was rejected by Bonneville upon the ground that such a premium was not prevailing within the electric utility industry within Bonneville's area of operations.

Plaintiffs have not filed any counter affidavits answering the affidavit of Cosgrove C. LaBarre. Plaintiffs' claim based on this alternative claim, presented by its amended complaint, must be denied.

Defendant has filed a counterclaim in the event that the plaintiffs should prevail here. Since the plaintiffs have not prevailed, defendant's counterclaim is dismissed.

CONCLUSION

Based on the reasons given in the opinion, we hereby allow defendant's cross motion for summary judgment and deny plaintiffs' motion for summary judgment. Plaintiffs' amended

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suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b) and as to plaintiffs' motions for call and further relief listed above.

IT IS ORDERED that plaintiffs' said motion for rehearing and motions for call and other relief are denied.

BY THE COURT

/s/Oscar H. Davis
Oscar H. Davis
Judge, Presiding

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APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

January 16, 1959

Mr. A. A. Peter
Assistant General Counsel
United States General Accounting Office
Washington 25, D.C.

Dear Mr. Peter:

This refers to your letter of December 19, 1958 (B-138063) asking whether laborers and mechanics in certain agencies of the Department of the Interior fall within the exception to the Classification Act of 1949, contained in paragraph (7) of section 202 of that act.

The Department of the Interior has requested your decision concerning the operation of Public Law 85-872 relating to the effective dates of increases in compensation granted to wage board employees. Public Law 85-872 applies to employees "whose compensation is fixed * * * under authority of section 202(7) of the Classification Act of 1949 (5 U.S.C. 1082(7)) or section 7474 of title 10 of the United States Code". The employees concerned are laborers and mechanics of the Bonneville Power Administration, the Southwestern Power Administration, the Bureau of Mines, and the Bureau of Reclamation.

You state that it might be argued that laborers and mechanics of the Bonneville Power Administration are excepted from the Classification Act of 1949, not by

reason of section 202(7), but rather by the provisions of section 5b of the Act of October 23, 1945, 16 U.S.C. 832i.

Section 5b of the Act of October 23, 1945, 59 Stat. 547, reads in pertinent part:

"The Administrator may employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities * * * and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States except the act of May 29, 1930, * * *."

The Commission believes that this provision was superseded by the Classification Act of 1949.

Section 201(b) of the Classification Act of 1949 provides that "Subject to the exemptions specified in section 202, and except as provided in sections 204 and 205, this Act shall apply to all civilian positions, officers, and employees in or under the departments." Attention is also invited to the provisions of section 1106 of the Act:

"(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act. * * *

"(b) The application of this Act to any position, officer, or employee shall not be affected by reason of the enactment of subsection (a)".

Thus all exceptions from the Classification Act of 1923 were superseded by the 1949 Act, and no exceptions from the 1949 Act were made unless they were specified in section 202. As explained in S. Rept. No. 847 on S. 2379, 81st Congress, p. 30:

"The general principle of Title II is to express a comprehensive general coverage in section 201, subject to specific exemptions in section 202. Thus, in order for a department, or a group of positions or employees in or under a department, to be exempted from the bill, an express exemption must be found, either in section 202 or in some other provision of *future* law." (emphasis supplied)

Accordingly, it is our view that laborers and mechanics of the Bonneville Power Administration are excepted from the Classification Act of 1949 by reason of section 202(7) of that act. In the absence of any other statutory exception, laborers and mechanics employed by the Southwestern Power Administration, the Bureau of Reclamation, and the Bureau of Mines fall within the exception to the Classification Act of 1949 contained in paragraph (7) of section 202 of that act.

We believe that Congress intended Public Law 85-872 to apply to all wage board employees. However, in view of the decision of the United States District Court for the District of the Canal Zone in *Boyd v. The Panama Canal Company*, decided January 10, 1958, we agree with your view that laborers and mechanics employed by the Alaska Railroad are excluded from the Classification Act of 1949 under section 202(14) rather than under section 202(7).

Sincerely yours,

Harris Ellsworth
Chairman

APPENDIX D

IN THE UNITED STATES COURT
OF CLAIMSAFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTION FOR REHEARING

District of Columbia, ss:

I, Edward F. Willett, Jr., Law Revision Counsel, U.S. House of Representatives, Room B-351, Rayburn H.O.B., Washington, D.C. 20515, being first duly sworn, on oath, state that the following is a true and correct statement based on my knowledge, information and belief:

A. Affiant is presently the Law Revision Counsel of the U.S. House of Representatives. Prior to the establishment of the Office of the Law Revision Counsel by House Resolution 988, October 8, 1974, enacted into permanent law by P.L. 93-554 (2 U.S.C. §285 *et seq.*, Supplement IV, 1974), Affiant served for approximately five years, first as Assistant Law Revision Counsel and thereafter as the Law Revision Counsel of the House Judiciary Committee.

B. That the following discussion by Affiant is a correct and true statement of the proper interpretation of Section 1106(a) and (b) of the Classification Act of 1949 (October 28, 1949, Ch. 782, 63 Stat. 972) and of the manner in which that Section has been codified and executed into both the United States Code and the District of Columbia Code to the present time.

1. Section 1106 of the Classification Act of 1949 provided:

(a) Whenever reference is made in any other law to the Classification Act of 1923, as amended, such reference shall be held and considered to mean this Act. Whenever reference is made in any other law to a grade of the Classification Act of 1923, as amended, such reference shall be held and considered to mean the corresponding grade shown in section 604 of this Act.

(b) The application of this Act to any position, officer, or employee shall not be affected by reason of the enactment of subsection (a).

Originally, in the 1952 edition of the United States Code, Section 1106(a) of the Classification Act of 1949 was executed in a purely mechanical matter by the substitution of "Classification Act of 1949" for "Classification Act of 1923" in the text of every section of the Code that contained a reference to the 1923 Act. For each section in which this substitution in text was made, Section 1106(a) of the 1949 Act was cited as a source credit, and an "Amendment" note was set out under the section to explain the change made by the 1949 Act.

Prior to the publication of the 1958 edition of the United States Code, the Civil Service Commission pointed out to the Law Revision Counsel of the House Committee on the Judiciary that Section 1106(b) of the Classification Act of 1949 provided that "The application of this Act to any position, officer or employee shall not be affected by reason of the enactment of subsection (a)." The Civil Service Commission noted that a number of sections appearing in the 1952 edition of the Code contained erroneous substitution of "Classification Act of 1949" for "Classification Act of 1923." The source credit cited for those substitutions was section 1106(a) of the 1949 Act.

The Commission advised (1) that the 1949 Act superseded preexisting exemptions to the 1923 Act, (2) that it was necessary to refer to sections 201 and 202 of the 1949 Act to determine to what extent the 1949 Act superseded preexisting law, and (3) that section 203 of the 1949 Act gave the Commission power to make those determinations.

Section 1106 of the 1949 Act was a technical section appearing in Title XI, "General Provisions," rather than in the "Coverage and Exemptions" title, Title II of the Act. Subsection (a) of Section 1106 was a short cut fashioned by the draftsman to conform to the 1949 Act those references in other laws to the 1923 Act without having to identify and specifically amend all the laws where references to the 1923 Act appeared. That it was not intended to provide exemptions beyond those carried in Title II of the 1949 Act is clear from the language of subsection (b). That language ensures that subsection (a) would not have the effect of providing exemptions to the 1949 Act that were additive to those contained in Title II.

2. With respect to *any law* containing an exemption from the 1923 Act, it is the opinion of Affiant, who holds the office of Law Revision Counsel, formerly the Law Revision Counsel of the House Judiciary Committee, that the substitution referred to in Section 1106(a) is, by virtue of Section 1106(b), proper *only if* a corresponding exemption can be found in Title II of the 1949 Act. If a corresponding exemption is not found in Title II, then the exemption from the 1923 Act is not an exemption from the 1949 Act, and a substitution under Section 1106(a) is not authorized. A substitution in such a law, without a corresponding exemption contained in Title II of the 1949 Act, would

have contravened Section 1106(b) because the substitution would have affected the application of the 1949 Act solely by reason of the substitution.

Support for this interpretation is contained in the legislative history of the 1949 Act. Senate Report No. 847, 81st Congress, 1st Session (1949) on S. 2379, the Senate Bill, reads as follows on page 30:

The general plan of title II is to express a comprehensive general coverage in section 201, subject to specific exemptions in section 202. Thus, in order for a department, or a group of positions or employees in or under a department, to be exempted from the bill, an express exemption must be found, either in section 202 or in some other provision of *future law*. [Emphasis supplied.]

See, also, House Report No. 1264, 81st Congress, 1st Session (1949) on H.R. 5931, the companion House bill that was enacted as the Classification Act of 1949, that reads on page 5:

In addition, a large number of individual exemptions in organic or appropriation acts, such as exemptions for attorneys, engineers, experts, etc., in certain agencies would be repealed by implication and the positions brought within the bill.

3. In executing Section 1106 into the United States and District of Columbia Codes, the interpretation set forth above has now been followed by the codifiers. In the case of laws set out in those Codes that contained an exemption from the 1923 Act, and with respect to which a corresponding exemption was not contained in Title II of the 1949 Act, the exemption has been eliminated from the text of the Code section and an explanation has been set out in a "Codification" note thereunder.

In the 1958 edition (the next full edition after the 1952 edition) of the United States Code, the codifiers eliminated from numerous sections provisions that in the 1952 edition had contained exemptions from the Classification Act of 1949 on the basis of Section 1106(a) of the 1949 Act. See, for example, the following sections (and the "Codification" notes thereunder) in the 1958 and subsequent editions of the United States Code: Title 7, Sections 172, 511m, 659, 1015, 1507, 1627; Title 12, Sections 659, 1020; Title 15, Sections 78d, 79z-5, 80a-45, 80b-18, 714h, 717q, 1023; Title 16, Sections 407r, 430z-1, 825i, 832i, 833h; Title 20, Sections 74, 76a, 77; Title 22, Section 293; Title 25, Section 305a; Title 29, Section 172; Title 31, Section 866; Title 41, Section 104; Title 42, Section 209; Title 46, Section 1111; Title 50 App., Section 326.

4. In order to clarify the "Codification" notes relating to those sections of the current (1970) edition of the United States Code in which an exception from the Classification Act of 1923 has been omitted (which notes have in some cases not drawn a clear distinction between the reasons for eliminating exceptions from the Civil Service laws and exceptions from the Classification Act of 1923), the codifiers will expand these notes in the forthcoming 1976 edition of the United States Code.

Some of the expanded Codification notes have been included in Supplement IV (1974) of the 1970 edition of the United States Code. These notes are similar to those included in the latest (1973) edition of the District of Columbia Code. See, for example, the notes under District of Columbia Code sections 1-262, 2-1709, 5-105, 5-713, 9-105, 9-209, 36-122.

/s/ Edward F. Willett, Jr.
Edward F. Willett, Jr.

No. 75-1432

Supreme Court, U.S.
FILED
JUN 29 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

LEROY W. ABELL AND JACK R. BARGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS***

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are hourly employees of the Bonneville Power Administration of the Department of the Interior, whose compensation is fixed through collective bargaining. They brought this action in the Court of Claims, contending that under the statutes governing their employment they are entitled to an additional 25 percent pay for Sunday work. The Court of Claims rejected that contention and upheld the validity of the present level of compensation (Pet. App. A, pp. 1a-24a).

The Administrator of the Bonneville Power Administration has authority to fix petitioners' compensation, by collective bargaining or otherwise, under Section 10(b) of the Bonneville Project Act of 1937, 50 Stat. 736, as added and amended, 59 Stat. 547.¹ That statute empowers

¹The statute was incorrectly codified at 16 U.S.C. 832i(b). See Pet. App. A, pp. 11a-13a.

the Administrator to "employ laborers, mechanics, and workmen in connection with construction work or the operation and maintenance of electrical facilities * * * and fix their compensation without regard to the Classification Act of 1923, as amended, and any other laws, rules, or regulations relating to the payment of employees of the United States * * *." Congress granted that authority to the Administrator in 1945 to alleviate the "problems in recruiting and retaining the skilled and semi-skilled workmen essential for operation of [the Administration's] complex facilities" (Pet. App. A, p. 6a).

Petitioners contend that this authority to fix compensation without regard to other laws was implicitly repealed by the Classification Act of 1949, as amended, 5 U.S.C. 5101, *et seq.*, and that they are therefore entitled to the 25 percent premium pay for Sunday work allowed to "prevailing rate employees" by the Federal Employees Salary Act of 1966, as amended, 5 U.S.C. (Supp. IV) 5544(a).

The Court of Claims correctly held that Section 10(b) of the Bonneville Project Act has not been repealed by implication. Section 1204 of the Classification Act of 1949, 63 Stat. 973, does provide that "[a]ll laws or parts of laws inconsistent with this Act are hereby repealed to the extent of such inconsistency." There is, however, no inconsistency between Section 10(b) and the 1949 Act. The latter Act by its terms does not apply to "employees in recognized trades or crafts, or other skilled mechanical crafts, or in unskilled, semiskilled, or skilled manual-labor occupations * * *." 5 U.S.C. 5102(c)(7). It does not apply, in other words, to the "laborers, mechanics, and workmen," such as petitioners, whose compensation the Administrator is empowered by Section 10(b) to fix "without regard to * * * any other laws, rules, or regulations relating to

the payment of employees of the United States * * *."² Since the two statutes are not inconsistent in their operations, the earlier has not been displaced or repealed by the later. See, *e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551; *United States v. Borden Co.*, 308 U.S. 188, 198.

In urging the contrary, petitioners refer to a 1959 letter from the Chairman of the Civil Service Commission to the Assistant General Counsel of the General Accounting Office, advising that laborers and mechanics employed by the Bonneville Power Administration fell within the 1949 Act's exception for craftsmen and unskilled, semi-skilled, and skilled manual laborers (Pet. App. C). Petitioners place reliance (Pet. 15-21) upon the portion of the letter in which the Chairman expresses the view that Section 10(b) of the Bonneville Project Act has been superseded by the 1949 Act.

The Chairman based that view on Section 1106(b) of the 1949 Act, 63 Stat. 972 (Pet. App. C, p. 2c). Section 1106 (a) provides that all statutory references to the Classification Act of 1923 "shall be held and considered" to be references to the 1949 Act; Section 1106(b) further provides that the application of the 1949 Act "to any position, officer, or employee shall not be affected by reason of the enactment of [Section 1106(a)]."

Section 1106(b) could not have been intended, and it did not operate, to repeal Section 10(b) of the Bonneville Project Act. Indeed, Section 1106(b), read carefully, is irrelevant to Section 10(b): since the 1949 Act by its terms does not apply to the laborers, mechanics, and workmen with whom Section 10(b) is concerned, replacing

²That the 1949 Act applies to the Administration as an "agency" (Pet. 22-24) is irrelevant in view of the fact that the Act leaves untouched the Administrator's authority with regard to the classes of employees here at issue.

Section 10(b)'s reference to the 1923 Act with one to the 1949 Act, as required by Section 1106(a), would not have affected the application of the 1949 Act even in the absence of Section 1106(b).

Petitioners contend that notwithstanding any possible analytical defects in the reasoning supporting the views expressed therein, the Chairman's letter bars the courts from holding that Section 10(b) survived enactment of the 1949 Act. They rely upon Section 203 of the 1949 Act, as amended, 5 U.S.C. 5103, which provides that the Civil Service Commission shall determine the applicability of the 1949 Act to specific positions and employees. But there is no dispute here over the Chairman's determination that the Bonneville employees fall within the 1949 Act's exception for craftsmen and unskilled, semi-skilled, and skilled manual laborers; the decision below does not challenge the correctness of that determination or interfere with the Commission's proper exercise of its jurisdiction. The issue before the Court of Claims was the separate question whether Section 10(b) had been repealed—a question that the Chairman's letter addressed but that the Commission had no power finally to decide. As the Court of Claims correctly observed (Pet. App. A, p. 17a), the question "whether a subsequent statute has, by implication, repealed a prior one is for the courts. *District of Columbia v. Hutton*, 143 U.S. 18, 27-28 (1892); *United States v. Claflin*, 97 U.S. 546, 549 (1878)."

In any event, it would not avail petitioners even if, as the Chairman's letter suggests, Section 1106(b) had been intended by Congress to effect a general repeal of all statutory exceptions to the 1923 Act. Such a repeal would have left standing that portion of Section 10(b) which empowers the Administrator to fix petitioner's compensation without regard to "any other laws * * * relating to the payment of employees of the United States * * *." That

provision, even standing alone, would be sufficient to defeat petitioners' present claim to additional Sunday overtime pay under the Federal Employees Salary Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.